STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM PATRICK HACKETT,

Defendant-Appellant.

UNPUBLISHED
February 24, 1998

No. 195698
Macomb Circuit Court
LC No. 94-001951-FH

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of 50 grams or more, but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). He was sentenced to four to twelve years' imprisonment and appeals as of right. We reverse and remand for a new trial.

Defendant argues that the prosecutor improperly used his post-arrest silence against him in two ways. We agree. First, the prosecutor asked defendant during cross-examination whether he ever confronted Patrick Logue, who testified for the prosecution pursuant to a plea agreement. Defendant responded that he had not been in contact with Logue since they were "locked up" after their arraignment. The prosecutor next asked defendant whether he told Logue at that point that he had nothing to do with the incident. Defendant responded that he had never made such a statement to Logue. Second, the prosecutor stated during closing argument that defendant did not tell Logue he had nothing to do with the incident because defendant was guilty.

On the existing record, there is no evidence that defendant's silence with Logue occurred during a custodial interrogation situation, nor that it was in reliance on *Miranda* warnings. Accordingly, there is no basis upon which to conclude that defendant's silence was a constitutionally protected silence. *People v Schollaert*, 194 Mich App 158, 166; 486 NW2d 312 (1992). Instead, we must address whether defendant's testimony regarding his failure to confront Logue was admissible under the Michigan Rules of Evidence. *Id.* at 167. Although defendant did not object to either instance of alleged prosecutorial misconduct, we review this issue because failure to do so would result in manifest injustice. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

The rule in *People v Bigge,* 288 Mich 417; 285 NW 5 (1939), precludes the admission of evidence of a defendant's failure to say anything in the face of an accusation as an adoptive or tacit admission of the truthfulness of the accusation under MRE 801(d)(2)(B) unless the defendant has "manifested his adoption or belief in its truth." *Schollaert, supra* at 167. In this case, the evidence at trial did not indicate that defendant either adopted or believed the accusation. Therefore, the evidence should not have been admitted, and the prosecution should not have been permitted to base its argument on that evidence. See, e.g., *People v Greenwood,* 209 Mich App 470, 472-474; 531 NW2d 771 (1995). We do not find these errors to be harmless. As in *Greenwood,* the evidence in this case was purely circumstantial and hinged on the credibility of defendant. Therefore, we conclude that defendant was denied a fair trial by the prosecutor's misconduct. We reverse defendant's conviction and remand this case for a new trial.

Several of defendant's other issues on appeal either impact the viability of the prosecutor's case or are likely to reoccur at retrial; therefore, we will review these issues to assist the trial court on remand.

Defendant argues that the 44-month delay in bringing him to trial following his first arrest violated his Sixth Amendment right to a speedy trial. We note that defendant did not raise this issue below; however, this Court may address a constitutional issue raised for the first time on appeal. *People v Johnson*, 215 Mich App 658, 669; 547 NW2d 65 (1996). We review the trial court's findings under the clearly erroneous standard, but we review the constitutional question of law de novo. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). To determine whether a defendant has been denied his right to a speedy trial, this Court considers the length of delay, the reason for delay, the defendant's assertion of the right to a speedy trial, and any prejudice to the defendant. *Id.* A delay of eighteen months is presumed to be prejudicial. *Id.*

Regarding the first factor, defendant contends that 44 months lapsed between his trial and his first arrest in 1991. However, defendant was not brought to trial based upon the arrest in 1991; rather, defendant was brought to trial on charges that were re-authorized against him in 1993. Defendant was not formally charged until September 7, 1994, when he appeared for arraignment. Thus, the period from his appearance until he went to trial on April 20, 1995, was approximately eight-and-a-half months. Therefore, there is no presumption that the delay before defendant's trial was prejudicial. Second, defendant's own motions, though filed for valid reasons, shared a substantial role in the reason for the delay of trial. Third, defendant did not assert his right to a speedy trial until his appeal; therefore, the trial court did not have an opportunity to address the alleged delay. Finally, defendant has not established that he was prejudiced by the delay. Accordingly, we find no constitutional violation.

Next, defendant argues that the trial court erred in admitting testimony of his previous arrest for this offense. The record indicates that defendant and another person were arrested in 1991 in a restaurant parking lot near the motel where Logue and an undercover police officer were engaged in a drug transaction. The district court magistrate concluded that the police officers did not have probable cause to arrest defendant and dismissed the charges against defendant. The circuit court judge affirmed the district court's ruling. After Logue agreed to testify against defendant, the police arrested defendant in 1993 for the same incident. Citing *Wong Sun v United States,* 371 US 471; 83 S Ct 407; 9 L Ed

2d 441 (1963), and the "fruit of the poisonous" tree doctrine, defendant's specific argument is that the trial court should not have admitted testimony of the 1991 arrest because "the evidence of the arrest itself was a fruit of its illegality, and should have been suppressed under the Fourth Amendment and Michigan exclusionary rules." This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Gibson*, 219 Mich App 530, 532; 557 NW2d 141 (1996).

On its face, the "fruit of the poisonous tree" doctrine suppresses only evidence that is "derived as a result of the illegal arrest." *People v Spencley*, 197 Mich App 505, 508; 495 NW2d 824 (1992). The fact that an arrest occurred cannot be evidence derived from the arrest itself; therefore, this doctrine alone does not suppress admission of the fact of the arrest. Even assuming that any error occurred by reason of this admission, the error was harmless in light of the trial court's instruction to the jury that the fact that the prosecutor charged defendant with a crime is not evidence of defendant's guilt. See *People v Humphreys*, 221 Mich App 443, 448; 561 NW2d 868 (1997). The trial court aptly stated to the parties that it was no surprise to the jury that the police believed that defendant was criminally involved in the incident because that was why defendant was facing a trial.

Next, defendant argues that the trial court erred in barring evidence that defendant had no prior criminal record. We find no abuse of discretion. Clearly, defendant's character was a major focus of his defense; however, the absence of a criminal record is not substantive evidence of a person's reputation or character, as permitted under MRE 404(a)(1). Neither is the absence of a prior criminal record a specific instance of defendant's conduct as permitted under MRE 405. Last, the absence of a prior criminal record is simply not relevant evidence under MRE 401. See *People v Phillips*, 170 Mich App 675, 680-681; 428 NW2d 739 (1988).

Finally, defendant argues that the prosecutor improperly cross-examined defendant's character witnesses and deprived defendant of a fair trial as a result. Five defense witnesses testified as to defendant's character: Tamara Smith, Eric Reinhardt, Heather Thompson, Gary Lazar, and Lynn Eastin. On cross-examination, the prosecutor asked each witness if he or she was with defendant or knew defendant when defendant was arrested. Whether a trial court has properly limited cross-examination is an issue reviewed for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). Regarding the cross-examinations of Thompson, Lazar, and Eastin, to which defendant did not object below, this Court reviews the issue only to prevent manifest injustice. *Turner*, *supra* at 583. We find that the trial court did not abuse its discretion in admitting the testimony at issue during cross-examination, nor did manifest injustice result from the cross-examination. The testimony was not beyond the scope of the direct examination and was relevant to the witnesses' credibility or basis of their knowledge of defendant's honesty or integrity.

We decline to address the remaining issues raised by defendant. Reversed and remanded.

/s/ Joel P. Hoekstra
/s/ Myron H. Wahls
/s/ Roman S. Gribbs